



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Scott McCallum, Governor
Darrell Bazzell, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TDD 608-267-6897

November 29, 2001

Mr. Robert Springer, Director
Waste, Pesticides, and Toxics Division
U.S. Environmental Protection Agency
77 W. Jackson Blvd.,
Chicago, IL 60604-3507

Subject: Local Government Enforcement Discretion Pilot Proposal

Dear Mr. Springer:

For over a year, WDNR and U.S. EPA have been discussing various methods for improving our ability to cleanup and redevelop Brownfield sites where hazardous waste activities have taken place. One option we are very interested in is implementing a pilot project to apply Wisconsin's enforcement discretion to Local Government Units or Economic Development Corporations acquiring an interest in property subject to Wisconsin Hazardous Waste Management requirements, through the course of normal business activities, such as tax delinquency foreclosure who have not acted to cause the contamination. WDNR's proposal provides for a case-by-case analysis in order to determine whether its enforcement discretion is appropriate given the site-specific situation. WDNR will use the liability exemption criteria in ch. 292, Wisconsin Statutes as the basis for determining the appropriateness of issuing an assurance of its enforcement discretion with respect to imposing corrective action requirements under Wisconsin's Hazardous Waste requirements.

At a meeting on March 9, 2001 you indicated that we should prepare a letter which provides the specific details on our proposal. You went on to say that the letter needs to identify the criteria we would use in determining whether the use of our enforcement discretion was appropriate and would also need to describe the pilot process and how this type approach would be implemented.

On April 20, 2001 WDNR submitted a proposal to EPA for review. EPA issued a response letter on June 4, 2001. Several conference calls and a follow-up meeting were held in order to gain a better understanding of EPA's concerns. Based on these discussions, WDNR submitted a revised proposal on October 22, 2001. Additional discussions resulted in the need for further revisions. What follows is background material along with a specific proposal, which supersedes our letters of April 20, 2001 and October 22, 2001.

Background Information

There are thousands of brownfields properties located in Wisconsin, with many in need of local cleanup and redevelopment assistance. However, even when local governments have the authority to acquire such properties, officials are often reluctant to do so because of concerns about potential environmental liability. In the past, local governments that acquired contaminated property, even if they did not purchase it, were considered responsible under Wisconsin's Spill Law because they "possessed" or "controlled" the contaminated property.

The State's Land Recycling Law, which became effective in 1994 and was subsequently modified in the 1997-1999 state budget, provided certain limitations on a local government's environmental liability under the Spill Law and created incentives for local governments and certain economic development corporations to redevelop property, depending on how the property is acquired. Specifically, if a local government acquires property through tax delinquency, bankruptcy proceedings, condemnation, eminent domain, escheat, for slum or blight elimination, by using Stewardship funds, or from another eligible local government, the local government is not responsible for investigating or remediating the hazardous substance discharges at the property. This exemption from liability protects a municipality unless the release is caused by an action taken by the municipality or due to failure of the municipality to take limited actions to prevent further spills.

In the past, the local government exemption from the Spill Law did not apply to discharges from a federally regulated underground storage tank. The 1999-2001 state budget changes the exemption to include properties where a discharge was from a federally regulated tank. However, local governments are still responsible for removing abandoned underground storage tanks.

Federal Exemptions

There are liability protections under the federal Superfund law for local governments, but RCRA does not provide the same protections. Specifically, section 101(20)(D) of CERCLA provides that: a unit of state or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment or other circumstances in which the government involuntarily acquires title by virtue of its function as a sovereign entity, is not considered to be an owner or operator.

In October, 1995 the EPA issued a policy clarifying that when a municipality acquires property through tax delinquency, foreclosure, demolition lien foreclosure, escheat, abandonment, condemnation, or eminent domain, the municipality will not be held liable for contamination by the federal Superfund program. This policy was subsequently adopted as law in 1996. This exemption also applies to municipalities that acquire property from a county that took the property through an involuntary action.

WDNR Proposal

The potential liability for sites with implications under Wisconsin's Hazardous Waste Management requirements significantly reduces the ability to cleanup and redevelop properties because the local government could become the "owner/operator" and therefore potentially subject to full liability under Wisconsin's Hazardous Waste Management requirements. Given the thousands of Brownfields sites in Wisconsin, hundreds of which previously managed hazardous wastes, additional incentives are necessary to assist local governments and economic development corporations interested in acquiring properties with implications under Wisconsin's Hazardous Waste Management requirements.

Therefore, we are proposing to implement a 48-month pilot program where WDNR could use its enforcement discretion, on a case-by-case basis, with regard to local governments and qualified economic development corporations acquiring an interest in the property during the pilot period, who have not caused the contamination and who meet the criteria set forth in State statutes. Local governments and economic development corporations meeting the criteria could, upon request, receive a written assurance of Wisconsin's enforcement discretion from WDNR. In order to be eligible to receive an assurance of Wisconsin's enforcement discretion local governments and economic development corporations would need to meet the provisions in s. 292.11(9)(e), Wis. Stats. (Please see attached statutory language and fact sheet).

Utilizing this approach would help leverage the assistance of local governments and economic development corporations to ensure that we achieve our goal of increased Brownfields cleanup and redevelopment. This is especially critical at blighted or tax delinquent properties, where the person that caused the contamination is not able to pay for the cleanup of their Brownfields property contaminated with hazardous wastes. These properties are often left to the community to handle, through their limited financial capacities. Note that WDNR will continue to pursue any viable responsible parties (RP's), and will hold any such parties responsible for cleanup.

The 48-month pilot program would be implemented as follows:

- The Local Government Unit would submit information to WDNR on the property that they wish to acquire. The submittal would need to specifically identify which of the criteria listed in s. 292.11(9)(e), Wis. Stats., would be used.
- As part of the submittal, if the LGU is interested in obtaining an assurance of Wisconsin's enforcement discretion from WDNR, they must request that WDNR review the information and provide them with a written clarification of the applicability of Wisconsin's Hazardous Waste Management requirements and the State Spill Law.
- If the Department determines that the criteria set forth under s. 292.11(9)(e), Wis. Stats., are met then the LGU would receive an assurance of Wisconsin's enforcement discretion from WDNR regarding the provisions of ss. 291.25(1) to (5), 291.29, and 291.37, Wis. Stats., and rules promulgated under those provisions provided the LGU:

1. Complies with the requirements of s. 292.11(9)(e), Wis. Stats.,
 2. Determines if any containerized material on the property is defined as hazardous waste, and
 3. Ensures that any containerized hazardous waste is properly managed in accordance with the state hazardous waste rules (NR 600 series).
- Economic Development Corporations (EDC's) seeking to acquire a property to further the economic development need to follow the requirements contained in s. 292.11(9)(e)1s., 4., and 5., Wis. Stats., and the steps listed above in order to receive an assurance of Wisconsin's enforcement discretion from WDNR.
 - Those LGU's and EDC's that receive an assurance of Wisconsin's enforcement discretion from WDNR as part of the pilot will be assured that the state's use of its enforcement discretion will continue throughout their ownership of the property, unless site-specific information is provided to WDNR that changes the LGU's or EDC's status, or in the event that property is transferred to a non-LGU or EDC.

During implementation of the pilot, WDNR will track all projects where the use of its enforcement discretion is applied to LGU's and EDC's regarding Wisconsin's Hazardous Waste Management requirements. The list of cases will be sent to EPA on an annual basis. After 42 months, WDNR will submit a preliminary evaluation of the pilot project, and may submit a request for an extension of the pilot project to the Director of the Waste, Pesticides and Toxics Division at Region V. If no request for an extension is made by WDNR, the pilot project will automatically terminate at the end of 48 months.

Summary

This proposal specifies that any local government considering taking title to a property would need to submit a general liability clarification request to WDNR. The letter needs to specify the reason they are taking title to the property and specifically request a response from WDNR clarifying the applicability of Wisconsin's Hazardous Waste Management requirements. This approach would allow the Department to track the number of requests received, as well as to document whether an assurance of Wisconsin's enforcement discretion was granted and the reasons why the particular decision was made. Our proposal would also provide for a mechanism to disapprove submittals that don't specifically meet our statutory requirements and the provisions of the pilot proposal.

We look forward to receiving your response to this proposal. If you have any questions regarding this letter, please do not hesitate to contact Mark Gordon at 608-266-7278 or Darsi Foss at 608-267-6713.

Mr. Robert Springer – November 29, 2001

Sincerely,

Mark F. Giesfeldt, P.E., Director
Bureau for Remediation and Redevelopment

Suzanne Bangert, Director
Bureau of Waste Management

c: Air and Waste Management Team
Remediation and Redevelopment Management Team
Waste Management Team
Deb Johnson – LE/5
Mark McDermid – CE/8
Gerry Phillips – EPA Region V
Karen Peaceman – EPA Region V

Attachs.

s. 292.11, Wis., Stats.
ch. 291, Wis., Stats.
LGU Fact Sheet